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In The

Supreme Court of the United States

October Term, 1998

BRADLEY BERRY; DONNA DAVID ELLIOTT, as Administratrix of the Estate of Charles Elliott; LOUIS FETHERMAN; HOPE RAMIREZ, Personal Representative of the Estate of Martin Lumbert and Sole Surviving Heir; MUSTAFAH MANNSUR; KEVIN MILLER; JOHN RODRIGUEZ; JIM ROOS; RANDALL SCHARMEN; ROBERT SETTLE; LETICIA FETHERMAN; MARGARET ANN MANNSUR; SANDRA SETTLE SORRENDINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the *Feres* Doctrine should be overruled?

II. Whether, even if the *Feres* Doctrine is not overruled, the judicial extension of *Feres* in *United States v. Johnson* should be overruled?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Bradley Berry, Donna David Elliott, as Administratrix of the Estate of Charles Elliott, Louis Fetherman, Hope Ramirez, Personal Representative of the Estate of Martin Lumbert and Sole Surviving heir, Mustafah Mannsur, Kevin Miller, John Rodriguez, Jim Roos, Randall Scharmen, Robert Settle, Leticia Fetherman, Margaret Ann Mannsur, Sandra Settle Sorrendino, respectfully pray this Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on October 20, 1998.

OPINIONS BELOW

The October 20, 1998, opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is reprinted in the Appendix (hereinafter "App.") hereto, p. 1.

The December 16, 1997, opinion of the United States District Court for the Eastern District of North Carolina is unreported and reprinted at App. 5.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action issued on October 20, 1998. The jurisdiction of this Court to review the judgment of that court is invoked under 28 U.S.C. §1254.

FEDERAL STATUTES INVOLVED

This case involves the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. §§1346, 2671-2680. The provisions of all pertinent portions of the FTCA are set out in the Appendix hereto at pages 71-83.

STATEMENT OF THE CASE

A. THE FACTS

Petitioners initiated this action by Complaint filed December 20, 1996, alleging claims under the FTCA, predicated on the negligence of numerous government officials, but more specifically military air traffic controllers at Pope Air Force Base Tower and civilian air traffic controllers at Fayetteville Approach and Washington Center which proximately caused a mid-air collision between two military aircraft over Pope Air Force Base, North Carolina, and serious injuries or death to a number of petitioners on the ground. App. at 10-11. Accordingly, petitioners' complaint contains damage claims for personal injuries sustained by nine petitioners, wrongful death claims for two petitioners and loss of consortium claims for spouses of three petitioners. *Id.*[1]

On March 23, 1994, all of the military petitioners and the deceased were active duty servicemen in the United States Army stationed at Fort Bragg, North Carolina. These servicemen were paratroopers preparing for a training jump when an airplane crash between two military aircraft occurred at Pope Air Force Base. *Id.*

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[1] Petitioners' Complaint was amended on February 12, 1997, so as to contain verifications by all of the surviving petitioners. The amended Complaint in its entirety is contained in the Appendix hereto, beginning at App. 10.

Specifically, the aircraft involved a United States Air Force F-16D Fighter and an Air Force C-130 Hercules Transport Aircraft. Petitioners' Complaint, in explicit detail, sets forth the flight path of both aircraft and the alleged negligent acts which led to their collision over Pope Air Force Base with the resulting death and injuries on the ground below. *Id.* at 14-17.

Specifically, petitioners allege both military and civilian air traffic controllers at the three towers involved were negligent in that improper hand-off procedures for the F-16D were used between towers; incorrect call signs at all three towers were used with regard to identification of each of the aircraft, resulting in misidentification of aircraft; improper and inadequate supervision of air traffic controller trainees and personnel existed at all towers; each of the towers utilized uncorrected and erroneous tower radar displays with regard to both aircraft; erroneous placement of flight data strips occurred; air traffic controllers were unfamiliar with the F-16D landing pattern in this case and, accordingly, the timing of that pattern as it affected the speed of the slower C-130 leading to a predictable collision course between the aircraft which, in fact, occurred; general insufficient and inadequate training of personnel in the control towers existed; and an unreasonable, inadequate and non-comprehensive airspace plan was in place at Pope Air Force Base and Fayetteville Approach Control in general. *Id.* at 14-28. An investigative report of the crash issued by respondent's Department of the Air Force entitled "AFR 110-14 USAF Aircraft Accident Investigation Report" supports these allegations of negligence with its summarized findings alleged in petitioners' verified Amended Complaint. App. at 17-18.

As a result of the negligence of the military and civilian air traffic controllers, joint and several, with the

civilian air traffic controllers' negligent acts being an independent proximate cause of petitioners' injuries and deaths even if no negligence were found on the part of military air traffic controllers, petitioners suffered massive injuries and burns from the F-16D aircraft which crashed at Pope Air Force Base igniting a parked, fully fueled, C-141 aircraft that was to be used in the imminent training jump. The burning fuel and wreckage spread immediately and caused the death of twenty-four paratroopers and injury to one hundred other paratroopers assembled on the ground Ramp.

B. PROCEEDINGS IN THE COURTS BELOW

Before the District Court below, respondent filed a Motion to Dismiss petitioners' Amended Complaint alleging the District Court lacked subject matter jurisdiction in that, pursuant to *Feres v. United States*, 340 U.S. 135 (1950), no waiver of sovereign immunity exists for law suits brought by servicemen for claims arising out of or in the course of activity incident to their service. Respondent did not contest claims of negligence in this case; rather respondent's sole argument was the *Feres* Doctrine bars consideration of petitioners' claims and, even if *Feres* does not preclude the claims, the extension of *Feres* in *United States v. Johnson*, 481 U.S. 681 (1987) forecloses this action.

Petitioners did not contest respondents' Motion to Dismiss in the District Court and, in fact, specifically filed this action with the following understanding, found at paragraph 207 of petitioners' Amended Complaint:

> All the claims for relief set forth in this Complaint are filed pursuant to F.R. Civ. P.11(b)(2) and plaintiffs are seeking modification or reversal of existing law under *Feres v. United States*,

340 U.S. 135 (1950) and *United States v. Johnson*, 481 U.S. 681 (1987).

App. at 59. As a result of petitioners' concession, the District Court found the *Feres* Doctrine precluded petitioners' action and dismissed all claims under *United States v. Johnson, supra.* App. at 6-7.

A panel of the United States Court of Appeals for the Fourth Circuit unanimously affirmed the decision of the District Court in an unpublished opinion on October 20, 1998. App. at 2. Before both the District Court and the United States Court of Appeals for the Fourth Circuit, petitioners specifically contended *Feres v. United States, supra,* and *United States v. Johnson, supra,* should be overruled and these claims allowed to proceed to trial. Both lower courts, recognizing the limits on their respective authority, declined to disturb extant authority of this Court and the issues of whether the *Feres* Doctrine and the judicial extension of *Feres* in *United States v. Johnson, supra,* should be overruled are now expressly before this Court.

This Petition for Certiorari was filed timely seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. The *Feres* Doctrine was wrongly decided and has no basis in the text of the FTCA; the rationales used to support the doctrine have been expressly repudiated or abrogated over time and it continues to receive widespread criticism and condemnation for the unjust results it causes.

A. The Federal Tort Claims Act

The original FTCA, enacted by Congress in 1946, effectively waived the federal government's sovereign immunity in tort actions. Although the United States had

consented to be sued in contract disputes since 1887 when the Tucker Act was adopted, the only effective federal tort remedy was by passage of a private bill in Congress. The major purpose behind the FTCA "was to compensate the victims of negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). The basic objective of the statute was intended to be accomplished through the Act's waiver of the Government's traditional immunity from suit for tort and through its provisions for administrative and judicial remedies under which the United States' liability was to be the same as that of any private individual or entity.

This broad waiver of immunity is limited by thirteen exceptions. 28 U.S.C. §2680. The FTCA specifically retained immunity for acts or omissions of government employees who use due care to enforce a statute or regulation. Additionally, government workers continue to be immune from suit for performing or failing to perform a discretionary function or duty, irrespective of whether an abuse of discretion is established. 28 U.S.C. §2680(a). Furthermore, permission to sue was expressly withheld for a number of torts, including assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit and interference with contract rights. *Id.* at §2680(h). Of critical import, the Act, also excluded actions by military and naval personnel arising out of combat actions during war time. *Id.* at §2680(j). No language exists in the text of the FTCA, however, which expressly prohibits noncombatant claims by servicemen against the government.

B. The *Feres* Doctrine

The first opportunity for this Court to apply the FTCA to claims by military personnel occurred in *Brooks v. United States*, 337 U.S. 49 (1949). In *Brooks*, the Court allowed a claim under the FTCA when two servicemen who were off-duty and off-base in a private car, were hit by a United States Army truck. The Court held that because none of the express exceptions to the FTCA barred recovery, the servicemen could bring claims for injuries that were not incident to their military service. *Id.* at 51. The Court reasoned Congress did not intend to exclude these types of claims and availability of veterans' benefits did not foreclose additional tort recovery. *Id.* at 53.

One year after *Brooks*, the Court took the case of *Feres v. United States, supra*. *Feres* involved a consolidation of three cases involving servicemen who were injured on active duty. In the first case, a servicemen died in a fire while asleep in his barracks. *Feres v. United States*, 177 F.2d 535 (2nd Cir. 1949). Negligence was alleged on the part of military personnel for maintaining a defective heating element in the barracks and on the part of the military fire guard assigned to the area. The second case, *Jefferson v. United States*, 178 F.2d 548 (5th Cir. 1949), was brought by a former serviceman who underwent surgery while in the Army, and in a non-military operation six months later, an Army towel was removed from his body. The serviceman brought a medical malpractice claim against the Government. The third case, *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949), was also a medical malpractice case brought by the executrix of a serviceman's estate.

The Court denied all three claims under the FTCA and held that the government was not liable for injuries to servicemen "when the injuries arise out of or are in the

course of activity incident to service." *Feres*, 340 U.S. at 146. The Court emphasized the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole." *Id.* at 139.

The *Feres* Court relied on three separate rationales to support its decision. First, it determined there was no parallel private liability, and the purposes of the FTCA was not to create new causes of action. The Court stated: " 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.' " 340 U.S. at 141 *quoting* 28 U.S.C. §2674. Because private individuals did not have the power to mobilize a private army, the Court reasoned the FTCA did not create a new law of intramilitary negligence. 340 U.S. at 142. The Court stated: "Its effect is to waive immunity from recognized causes of action and was not to visit the government with novel and unprecedented liabilities." *Id.*

The second rationale concerned the FTCA provision that the applicable law of the state in which the negligent act or omission occurred determines liability. The Court believed "[i]t would hardly be a rational plan" to base recovery on state laws which "fluctuate in existence and value." *Id.* at 143. The distinct federal relationship between servicemen and the government dictated federal law should control the relationship and since no federal law would have permitted a soldier to recover for negligence against his superior officers of the government he was serving, the Court determined plaintiffs had no cause of action. *Id.* at 144.

The third rationale involved the availability of Veteran's benefits. Congress had previously provided "systems of simple, certain and uniform compensation for

injuries or death of those in the armed services," and the Court determined Congress intended these benefits to be the sole source of recovery. *Id.* at 146.

In *United States v. Brown*, 380 U.S. 110 (1954), the Court enunciated the fourth and final rationale of the *Feres* Doctrine and that is the need for military discipline:

> "The peculiar and special relationships of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read the Act as excluding claims of that character.

380 U.S. at 112.

C. *Johnson* Case

In *United States v. Johnson, supra*, the widow of a Coast Guard helicopter pilot sued the United States under the FTCA, claiming flight controllers for the Federal Aviation Administration (FAA), a civilian agency, negligently caused her husband's death while he was flying a rescue mission. 481 U.S. at 683. Relying on the *Feres* doctrine, a federal district court dismissed the suit. The Court of Appeals for the Eleventh Circuit reversed, arguing courts should apply *Feres* differently depending on the status of the party who committed the alleged tort. The Eleventh Circuit described the "typical *Feres* factual paradigm" as a suit against another member of the military, arguing that, because FAA air traffic controllers are civilians, the district court should have dismissed the action only if doing so served the rationales underlying the *Feres* doctrine. *Johnson v. United States*, 749 F.2d 1530, 1536 n.6 (11th Cir. 1985). The Court of Appeals also identified military discipline as a prime concern of the doctrine and concluded that a trial examining a civilian

air traffic controller's conduct would not impair military discipline. *Id.* at 1539. In an *en banc* rehearing, the Eleventh Circuit approved the panel opinion. *Johnson v. United States*, 779 F.2d 1492, 1493 (11th Cir. 1986) (*per curiam*).

In a 5-4 decision, this Court reversed. Writing for the majority, Justice Powell held the *Feres* doctrine bars members of the military from suing the Government for service-related injuries regardless of the civilian status of the alleged tortfeasor. Justice Powell first asserted that neither this Court nor the lower federal courts had ever held the military status of the alleged tortfeasor crucial to the application of *Feres*. 481 U.S. at 686-87.[2] Further, because Congress had nearly forty years to examine the *Feres* doctrine and to remedy any misinterpretation of Congressional intent, it would be inappropriate for the Court to modify the doctrine "at this late date." *Id.*

The Court then reviewed the three rationales underlying the *Feres* doctrine, asserting these rationales demonstrated the irrelevance of the tortfeasor's status. First, the Court stated, the "distinctly federal" nature of the relationship between the Government and servicemen requires the Government's liability for service-related injuries be "simple, certain and uniform" and not vary according to the situs of the alleged negligence. *Id.* at 2068. Second, servicemen receive "generous statutory disability and death benefits" under the Veterans' Benefits Act which "compare extremely favorably with those provided by most workmen's compensation statutes" and which require no litigation. *Id.* The FTCA, however, was designed to provide remedies to those who had none, and

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[2] The Court did admit, however, that all of the cases the Court decided under *Feres* had involved negligence by the military and that some of these cases contained language suggesting the tortfeasor's military status was relevant. 107 S. Ct. at 2066 n.7.

therefore, it should not apply to servicemen. Third, servicemen's suits against the Government for service-related injuries "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 2069. Even when the military was not the alleged tortfeasor, the Court held, "service-related suits would necessarily implicate military judgments and could undermine servicemen's 'duty and loyalty to . . . [their] service and . . . [their] country,' thus disrupting military discipline in the broadest sense of the word." *Id.*

Accordingly, this Court extended the *Feres* doctrine so as to prohibit members of the military from suing the Government for service-related injuries even when the tortfeasor was a civilian. As with *Feres*, the *Johnson* extension of *Feres* was a judge-made broadening of a judge-made exception to the FTCA. For the reasons which follow, *stare decisis* does not preclude a change in the law. *Feres, supra,* which was wrongly decided and *Johnson, supra,* which judicially extended the mischief wrought by *Feres* must be overruled.

D. *Stare Decisis* Does not Preclude a Change in the Law

As the Court held in *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597 (1991), "[S]tare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." 501 U.S. at 828 *quoting Halverton v. Hallock*, 309 U.S. 106 (1940). "[When governing decisions are unworkable or badly resolved, '[the] Court has never felt constrained to follow precedent.' " 501 U.S. at 827 *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1994).

Stare decisis was not, then, a doctrine designed to forever preclude a change in the law; it is not designed to perpetuate error. It is a golden rule, not an iron rule and

does not mandate the sanctification of ancient fallacies or require the erection of walls of fire around unjust rules. The doctrine does not impose upon contemporaneous courts a disabling doctrine of disability at self-correction. No mistake is an error unless a court refuses to correct it and error does not become invulnerable or ineradicable by age or inanition. "There is no virtue in sinning against light or in persisting against palpable error, for nothing is settled until it is settled right." *Spitzer v. Commissioners*, 188 N.C. 30, 32, 123 S.E.2d 636, 638 (1924).

Notwithstanding the general rule that statutory precedents enjoy a strong presumption of correctness, this Court has overruled or materially modified statutory precedents more than ninety times since 1961. Indeed, on a number of occasions, the Court has explicitly repudiated both the reasoning and result of a statutory precedent. *See, e.g., State Oil Company v. Barkat U. Khan & Khan & Associates, Inc.*, 522 U.S. ___ (1997); *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468 (1987); *Puerto Rico v. Branstad*, 483 U.S. 219 (1987); *Brown v. Hotel Employees International Union Local 54*, 468 U.S. 491 (1984); *Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752 (1984); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983); *Trammal v. United States*, 445 U.S. 40 (1980); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The *Feres* doctrine is a judicially-made exception to the Federal Tort Claims Act. As discussed *infra*, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *United States v. Johnson*, 481 U.S. at 700 (Scalia, Brennan, Marshall and Stevens, J.J., dissenting). *Johnson's* extension of *Feres*, which even more directly controls the case *sub judice*, was a decision by the narrowest of margins over a

spirited dissent challenging the basic underpinnings of the decision and the *Feres* doctrine.

As such, *stare decisis* should not prevent this much needed review of the *Feres* Doctrine nor ought it save an opinion so problematic as *Johnson*. The grounds for overruling the *Feres* Doctrine and its judicial enhancement in *Johnson* are set forth below.

E. The Basis for Overruling the *Feres* Doctrine

The FTCA marked "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres*, 340 U.S. at 139. Its primary purpose was "to extend a remedy to those who had been without" one. *Id.* at 140. The plain language of the FTCA rendered the government liable to "all persons, including servicemen, injured by the negligence of government employees." *United States v. Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). No provision of the Act then precluded or today precludes FTCA suits by servicemen. Indeed, the one exemption that prohibits military personnel from bringing any claim against the government arising out of combatant activities "demonstrate[s] that Congress specifically considered, and provided what it thought needful for the special requirements of the military." *Id.*[3]

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[3] Although the plain language of the Act, construed in context, should have been enough to sustain a different result in *Feres*, it was not, so resort to legislative history, a hazardous occupation at best, is of some value. There is clear indication from the statements of the drafters of the FTCA that the Act was not meant to prohibit tort claims of servicemen. In the Fourth Circuit's opinion in *United States v. Brooks*, 169 F.2d 840 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949), that court held all members of the armed forces were, by implication, excluded from FTCA coverage. In a statement to Yale Law Review, following that

As previously discussed, there were four justifications for the *Feres* Doctrine, three articulated in *Feres* itself and the military discipline explanation subsequently delineated in *Brown, supra*. *Feres* itself was the only case from the Court to mention the first rationale, that no private liability exists. 340 U.S. at 141-42. This basis of support, however, was abrogated in *Indian Towing Company v. United States*, 350 U.S. at 66-69. In *Indian Towing*, the Court rejected a "parallel private liability" theory to bar recovery against the Coast Guard for the negligent operation of a lighthouse. This holding was then echoed in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), where the Court stated "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319. *See also United States v. Muniz*, 374 U.S. 150 (1963). Accordingly this Court did not even refer to the "parallel private liability" rationale in *Johnson, supra*, and it must be

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decision, on November 26, 1948, Representative Emanuel Cellars, a key figure in the passage of the FTCA, challenged the reasoning of the Fourth Circuit:

> . . . . I had more to do with [the act] than any other member. I never intended to preclude a suit by a soldier. Despite the fact that the latter might have various and sundry remedies for compensation, pensions, hospitalization preferences, etc., these benefits had nothing whatsoever to do with, and are utterly unrelated to the right to sue under the Federal Tort Claims Act. . . . [T]he government deliberately removes the defense of sovereignty except in cases where the Act specifically makes an exception. The exception cannot be implied; it must be expressed. The court cannot read the exception into the law.

Statement *quoted in* Note, *Military Personnel and the Federal Tort Claims Act*, 58 Yale L.J. 615, 621 n.26 (1949).

considered defunct.[4] What remains is a doctrine, characterized in the *Johnson* dissent, as one "sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended. They are bad estimations at that." 481 U.S. at 695 (emphasis in original).

The first of the three remaining grounds is the distinctive federal character rationale. Yet, this argument "has barely escaped the fate of the 'parallel private liability' argument, though [this Court has] not yet acknowledged that it is erroneous [the Court has] described it as 'no longer controlling.' " *Id. citing United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985). *See also United States v. Muniz, supra.*

This second rationale is arguably based upon the fact that, under the FTCA, the law of the state where the injury occurs is controlling. 28 U.S.C. §1346(b). According to this rationale, Congress did not intend the "distinctively federal" relationship between the government and service members to depend on the vagaries of local law.

However, *United States v. Muniz, supra,* disposed of and rejected the distinctive federal character argument. In *Muniz,* a federal prisoner sued the government under the FTCA for an injury sustained while he was imprisoned. 374 U.S. at 151. Although *Muniz* did not involve the

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[4] Indeed, the "parallel private liability" basis of *Feres* has always been suspect for if Congress had intended sweeping and complete governmental immunity for negligence in the performance of activities in which private individuals do not engage, Congress would never have provided explicit exceptions in the FTCA for other activities in which private individuals do not engage such as transmitting postal matter, regulating the monetary system and collecting taxes. *See* 28 U.S.C. §2680(b), (i) and (c).

military, this Court noted a number of lower Courts had rejected similar claims largely relying on the *Feres* doctrine. *Id.* at 153. The *Muniz* Court was unpersuaded by this rationale and observed the plight of federal prisoners was similar to that of the service member: prisoners do not control where they are confined (just as service members do not control where they are stationed) and prisoners' recovery depends on the law of the state in which they are confined. *Id.* at 161-62. Despite this, the Court held a non-uniform right to recover is better than no recovery at all. *Id.* at 162. Accordingly, in *United States v. Shearer, supra,* the Court expressly determined this rationale was no longer availing in military negligence claims for as Justice Scalia stated in the *Johnson, supra,* dissent "non-uniform recovery cannot possibly be worse than (what *Feres* provides), uniform non-recovery." *Johnson,* 481 U.S. at 695-96.

Furthermore "the distinctive federal character" reasoning has only been applied to military personnel. As discussed in *Muniz,* it was not applied to federal prisoners, who actually have less say than military personnel as to where they are housed. Nor has it been applied to dependents of military personnel or military retirees, who for example make up two-thirds of all patients treated at military hospitals. 134 CONG. REC. H354, 360 (Daily Ed. February 17, 1988) (statement of Rep. Rodino). Although retirees have a choice of where they live, dependents of active duty personnel have no more choice than their active duty sponsors. Likewise, service members who bring tort actions against civilians are limited to the state in which they have been assigned. Thus, there seems "nothing 'unfair' about a rule that says that just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a

negligent Government employee." *Johnson*, 481 U.S. at 696 (Scalia, J. dissenting).

While it is true there is a definite federal connection between the government and the military, this connection exists between the government and other federal departments as well. As the late Justice Marshall indicated in his dissent in *Stencel Aero*:

> It is true of course that the military performs "a unique nationwide function" . . . but so do the Bureau of the Census, the Immigration and Naturalization Service and many other agencies of the federal government. These agencies, like the military, may have personnel and equipment in all parts of the country.

431 U.S. at 675. The same reasoning holds true for almost all federal agencies. And, in many cases, civilian governmental employees have no more of a choice of domicile than their military counterparts. For example, if an FBI agent is transferred to Laramie, Wyoming, he packs up and goes just like his military counterpart, yet, the FBI agent can recover under the FTCA, while under *Feres*, the military servicemen cannot. The difficulty of continuing with this distinction is made even more apparent when contrasted with the fact the military is already liable under various state laws for claims brought by civilians under the FTCA. *See Indian Towing Company v. United States*, 350 U.S. at 69; *Johnson*, 481 U.S. at 695-96 (Scalia, J., dissenting); Note: *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?* 77 Mich. L. Rev. 1099, 1121 (1979). *See also* Comment: *"Providing Relief to the Victims of Military Medicine: A New Challenge of the Application of the* Feres *Doctrine in Military Medical Malpractice Cases"*, 32 Duq. L. Rev. 109, 121-22 (1993).

The third basis for the *Feres* doctrine is the existence of statutory death and disability benefits. 340 U.S. at 140. The argument is that, because Congress had provided

simple, certain and uniform compensation for injuries to service members in the Veterans' Benefits Act and had not reconciled these statutory benefits with the FTCA, Congress could not have intended service members to recover under the FTCA. *Johnson*, 481 U.S. 689-690.

The Veterans' Benefits Act provides compensation to any veteran injured in the line of duty and pays death benefits to the surviving spouse or children of any veteran who dies as the result of injury incurred in the line of duty. 38 U.S.C. §331 and 341. This argument regarding congressional intent fails in several ways.

First, this Court has been, at best, inconsistent in its denial of FTCA claims based on the availability of statutory benefits. In both *Brooks, supra,* and *Brown, supra,* the Court allowed recovery under the FTCA even though the servicemen received Veterans' benefits for their injuries. These cases have never been explicitly overruled. Furthermore, the Court has never explained why Veterans' benefits are the exclusive remedy for injuries sustained "incident to service" but not the exclusive remedy for service members whose injuries were not sustained "incident to service." *See* Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War,* 29 St. Louis U.L.J. 383, 402 (1985).

Second, congressional silence as to the exclusivity of Veterans' benefits is at best ambiguous. Indeed, in *Brooks, supra,* the Court outlined three factors supporting an inference that Congress did *not* intend Veterans' benefits to be exclusive. The Court first noted that "[u]nlike the usual Workman's Compensation statute, . . . there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy." 373 U.S. at 53 *citing* 33 U.S.C. §905 (1946). Also, Congress did not "provide for an election of remedies, as in the Federal Employees' Compensation Act." *Id. citing* 5 U.S.C. §757

(1948). Finally, the Court stated that in the FTCA, "Congress provided for exclusiveness of the remedy in three instances . . . and omitted any [such] provision" governing claims by service members. *Id. citing* 28 U.S.C. §§2672, 2676 and 2679 (1948). *See also United States v. Muniz*, 374 U.S. at 160.

Finally, the congressional intent argument fails because the availability of Veterans' benefits is not nearly as certain as the Court has assumed. In *Feres*, the Court compared Veterans' benefits to the usual Workers' Compensation statutes which generally include exclusivity provisions. Unlike most workers' compensation plans, however, Veterans' benefits are a gratuity on the part of the government and not a vested right of the service member. *See* Note: *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery*? 77 Mich. L. Rev. at 1107. As a result, Veterans' benefits are conditioned upon the disciplinary needs of the military, are not comparable to workers' compensation plans in which the certainty of recovery justifies exclusivity and do not adequately justify barring claims under the *Feres* doctrine. *Id. See also Johnson*, 481 U.S. at 697-98 (Scalia, J., dissenting).[5]

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[5] Although computations may have showed a favorable recovery under the Veterans' Benefits Act when compared to most workmen's compensation statutes in 1950, "no one would seriously contend that the provisions for Veterans' disability payments have kept pace with [for example,] medical malpractice" awards. 32 Duq. L. Rev. at 123-24. For example "a 22 year old Marine Corporal, (paygrade E-4) with four years of service and a base pay of $1,042.20 per month who also suffers a 20% disability [would receive] $8,337.60 in severance pay [and] a monthly disability pension of $208.44. If the E-4 lives to the age of 70, his generous military compensation will be $120,061.44 retirement pay and $8,337.60 severance pay for a total lifetime package of $128,399.04 to tide the young person over for the next 48 years." *Id.*

The final justification for the *Feres* doctrine, and one not articulated until after *Feres*, is the necessity to avoid intrusion into military discipline which might be caused by a full civilian adjudication of intramilitary tort claims. This concept of "military discipline" really appears to be a combination of three different concerns: causing disruption through factual inquiries, chilling decision-making by damage remedies and promoting disobedience of soldiers. Schwartz, *"Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine"*, 95 Yale L.J. 992, 1003-1007 (1986).

As to the issue of disruption, although military officials would no doubt prefer their decisions and actions be completely shielded from civilian review, this is a dubious basis for barring factual inquiry because a recognized public interest exists in having a military establishment not entirely closed, monolithic and secretive. *Id.* at 1004. Indeed, investigations into military or other executive affairs by Congress or the press appear to be vital to the political process. And, more important, this cause for concern has never been deemed strong enough to foreclose hailing military officers into court when the plaintiff was someone other than a serviceman. Indeed, the language of the FTCA makes explicit Congress contemplated suits against the military, leaving exceptions for liability only for claims "arising out of combative activities of the military . . . during time of war." 28 U.S.C. §2680(j). Since civilian plaintiffs are not barred from bringing suit for injuries caused by the tortuous conduct of the military, and the extent of factual inquiries into military affairs does not appear to be substantially different in civilian claims than military personnel bringing the exact same claim, this basis for barring recovery by servicemen simply fails to withstand scrutiny.

Although vigorous decision making and execution of military activities represents an important societal interest that can conflict with the interest in deterring improper conduct by military officers, and the prospect of intramilitary damage remedies could chill vigorous command decision-making, the public interest in protecting decision-making processes varies with the type of decision involved. 95 Yale L.J. at 1005. For example, any military decision during wartime may well be entitled to the utmost protection from judicial intrusion, but on a continuum of importance, a decision of a doctor to cut the wrong duct in a gall bladder operation on a serviceman deserves far less protection. Yet, the *Feres* doctrine indiscriminately accords the same absolute protection to combat decisions as it does to decisions to commit malpractice or, for that matter, sexual assault. The breadth of claims barred by *Feres* begs for reconsideration of the doctrine and replacement of the current sweeping prohibition with a far more particularized inquiry into the military function or type of decision protected. *Id.* at 1005-1006.

Finally, as to promoting disobedience of soldiers, the theory has been that hearing intramilitary tort claims on the merits would interfere with the special authority relationship between military personnel and their superiors, thus, suggesting lower-ranking personnel would become more likely to challenge or defy orders if they believed they could assert rights enforceable in civilian courts.

The underlying error behind a policy of barring claims to prevent interference with immediate compliance to commands is that military discipline is not actually built upon a habit of blind obedience. 29 St. Louis Univ. L.J. at 407-09. Rather, it is built upon the service member's respect for, and loyalty to, both his commanding officers and the military's objectives. *Id.*

Furthermore, the military does not have a legitimate or recognized interest in the blind obedience of its personnel. Indeed, military law imposes an obligation on soldiers to refuse to obey unlawful orders, a duty inconsistent with unthinking and blind obedience even to combat commands. 95 Yale L.J. at 1006-7. For example, soldiers are subject to criminal sanctions for obeying orders to commit war crimes. *See United States v. Calley*, 22 C.M.A. 534, 541-48, 48 C.M.R. 19, 16-29 (1973). Finally, the military's interest in strict discipline cannot be the value of obedience for its own sake, or even for purposes for performing the military's wide range of non-combatant functions; rather, its interest lies in its connection between discipline and combat readiness. Yet combat effectiveness, as a practical matter, is not necessarily correlated with blind obedience to command. *Id.*

Military law thus embodies policies that ensure the need for obedience does not preclude significant rights and remedies against superiors in many contexts outside of tort claims. For example, the Court of Claims has jurisdiction over claims involving interference with military career advantage and it may award "liquidated or unliquidated damages in cases not sounding 'in tort'". 28 U.S.C. §1491(a)(2).

In addition, junior servicemen are provided many avenues for redress within the military that directly affect the superior-subordinate relationship. In the Navy and Marine Corps, for example, any person may communicate directly with his or her commanding officer and seek redress for any wrong committed by a superior not the commanding officer. *E.g.*, 11 U.S. Navy Reg., Art. 1150-51 (1990). In the event the complaint is against the commanding officer or if the complainant is dissatisfied with the commanding officer's resolution of the complaint, the complainant may seek redress under Article 138 of the

Uniformed Code of Military Justice. And, all of these remedies are available to all members of the military service against line and staff officers alike. Thus, it is difficult to understand how a medical malpractice or negligent air traffic controller case against the United States (not the individual officers involved) will do more to undermine military discipline than the initiation of an Article 138 complaint of wrongdoing.

In the end, there will always be some interference with the military function when any judicial review is granted. Interference alone, however, is not sufficient to bar claims of military servicemen where the plain language of the FTCA does not so provide. Actions brought by civilians or off-duty servicemen for injuries arising from the alleged negligence of military personnel, but independent of any injury to a serviceman, clearly may involve second-guessing of military orders or required testimony of military officers, yet, these actions have never been thought sufficient to threaten military discipline so as to warrant their dismissal.

At the time of its creation, the *Feres* doctrine may well have reflected prevailing opinion as to the status of the military. The fruits of military discipline and an effective chain of command had been impressed upon the country during the Second World War. However, since that time, the military has undergone significant changes, not only in the public's perception of its role, but in its scope of operation. The armed forces in peacetime resembles most other large governmental agencies in the normal course of activity. Certainly, the need for military discipline cannot be discarded and, in war, particularly, the officer in command cannot be second-guessed by courts less his effectiveness be totally negated. However, when military discipline is used as a rationale to protect the malpracticing physician who happens to be affiliated

with the military or the negligence of an air traffic controller who fails to perform the ministerial duties required of watching his screen and correctly identifying aircraft, the military disciplinary purpose has been corrupted.

If immunity in these cases were required by the text of the Congressional Act at issue, the result could be understood. However, under the straightforward language of the FTCA, military discipline is accorded its full importance where it matters most, by the preclusion of any suit arising from "combatant activities of military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j). In all other cases, the speculative dangers to military discipline appear to have been taken into account by Congress and determined to be outweighed by the demonstrable injuries and justices that would result from a grant of Congressional immunity. In enacting the *Feres* doctrine, the Court substituted its own policy judgment for that of Congress. "In sum, neither the three original *Feres* reasons nor the post-hoc rationalization of 'military discipline' justifies [the Court's] failure to apply the FTCA as written." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). And, the doctrine has failed to achieve harmony in the system of remedies against the government as established by the following example cited by Justice Scalia: *Johnson, supra*:

> A serviceman is told by his superior officer to deliver some papers to the local United States Courthouse. As he nears his destination, a wheel on his Government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the Courthouse that day), and the United States Marshall on duty. Under our case law and federal statutes, the serviceman may not sue the government (*Feres*); the guard may not sue the

> government (because of the exclusivity provision of the Federal Employees Compensation Act) (FECA); the daughter may not sue the government for the loss of her father's companionship (*Feres*), but may sue the government for her own injuries (FTCA). The serviceman and guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the government in the daughter's suit and in the guard's suit, even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may *not* implead the government in the serviceman's suit, even though the serviceman was compensated under a statute that does not contain an exclusivity provision (VBA).

481 U.S. at 701-02 (Citations omitted) (emphasis added).

Finally, as to the argument Congress could have amended the FTCA, following the *Feres* decision, to overturn that decision, the "un-legislated desires of later Congresses with regard to one thread in the fabric of the FTCA [can] hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946." *Id.* at 702-03. And even if they could, inferring acceptance of the *Feres* doctrine from a Congressional theory to act is "an uncertain enterprise which takes as its starting point disregard of the checks and balances in the Constitutional scheme of legislation designed to ensure that not all desires of a majority of the Legislature find their way into law." *Id.*

In conclusion, the law-making power that the Court assumed in *Feres* belonged in the first instance to Congress. Congress spoke when it enacted the FTCA in 1946

and that Act contained no exemption for suits by servicemen where the injuries arose out of or were in the course of activity incident to service. All of this might not matter were there any serious underpinning of the *Feres* doctrine left to grasp and if the rule had led to just results but, there is not and it has not. The doctrine has received extraordinary criticism and condemnation since birth, *see Johnson*, 481 U.S. at 701 (Scalia, J., dissenting), and absent legislation to the contrary, the government should be held accountable to its service members for tortuous acts committed against and injuries caused to them.

II. Even if *Feres* is not overruled, the judicial extension of the *Feres* doctrine in *United States v. Johnson, supra*, must be overruled as it is completely at odds with the text of the FTCA, wholly unsupported by the rationale used to create the *Feres* Doctrine initially and unjustly denies claims of servicemen injured and killed by the patent negligence of civilian tortfeasors creating sovereign immunity where none was legislated or intended by Congress.

Since the *Feres* doctrine is the only judicially created exception to the FTCA, at a minimum it should be narrowly construed and applied. To do otherwise would be to judicially divert from the language of Congress. Yet, this is precisely what *Johnson, supra*, did in extending the *Feres* bar to servicemen so now they are not only precluded from recovering damages for actions of military tortfeasors, they are also barred from recovery due to tortuous conduct of civilian officials incident to their military service.

Johnson, supra, extended *Feres, supra*, far beyond any reasonable boundary. Even if *Feres, supra*, is not overruled, the "incident to service test" should be a starting point and not the dispositive factor for claims. As the doctrine has evolved, the primary factor to be considered,

indeed the only rationale that remains of any practical usefulness, is the effect a claim might have on military discipline. However, military discipline is only implicated when "a special and peculiar relationship of the soldier to his superiors", *Brown*, 380 U.S. at 112, would become the subject of judicial inquiry. The *Feres* doctrine should never have been broadened to exclude claims based on negligent acts by *civilian* federal officials because there is little certainty military discipline will be adversely effected in those cases.

Indeed, the military discipline argument simply fails to hold water in situations like *Johnson, supra*, and the case at bar, where the issue of discipline is not involved in any aspect of the case against civilian tortfeasors. Petitioners in this case were standing on a ramp awaiting orders to load up for a jump. A plane crashes down upon them, igniting, burning, injuring and killing them due to the negligence, at least in part, of civilian air traffic controllers at civilian towers. In this scenario and *Johnson, supra*, whatever rationale may remain to support the *Feres* doctrine, it does not support a complete bar on these servicemen and their families being able to recover for their serious and deadly injuries. As Justice Scalia stated in his dissenting opinion for four justices in *Johnson, supra*:

> We have not been asked by respondent to overrule *Feres*, and so need not resolve whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone. As the majority acknowledges, however, "all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military." (Citation omitted). I would not extend *Feres* any further. I confess the line between FTCA suits alleging military negligence and those alleging

> civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness in a rationality that decision has bred. But that, I think, is justification enough.
>
> Had Lt. Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.

481 U.S. at 703.

In the case at bar, had petitioners been civilians or dependents of servicemen standing in the same spot and had the exact events that led to the crash of the aircraft over Pope Air Force Base occurred, those civilians and dependents could have sued the government for their injuries or in wrongful death actions. Yet, because the people who were maimed, disfigured, burned and killed were soldiers in the United States Army, they are barred from recovery of any damages against their government whose own civilian personnel caused their horrible injuries and agonizing deaths. As Justice Scalia stated in *Johnson, supra*, "If that decision bore the legitimacy of Congressional approval, it might be considered just. But it has not been, and it is not." 481 U.S. at 703. As the discussion above establishes, there is little left of the *Feres* rationales except for the military discipline concern. In

the context of civilian tortfeasors, however, and specifically where it involves air traffic controllers, it goes without saying that radar control of aircraft does not require special military expertise or judgment. The determinations of negligence against *civilian* air traffic controllers is a subject matter over which federal courts have ample experience and are fully capable of resolving.

Sovereign immunity, whose origin dates from the middle ages, is a present-day anachronism. For years the doctrine caused widespread injustice by denying private persons a remedy for wrongs committed by agents of the government. In enacting the FTCA, Congress waived the government's immunity from suits sounding in tort. Cognizance of both past and potential injustices of the doctrine of sovereign immunity demands the FTCA be read broadly and any exception to it narrowly. The *Feres* doctrine was not developed based on claims against civilian federal officials. Permitting claims against the United States under the FTCA for personal injuries arising from the negligence of civilian personnel toward active duty servicemen would effectuate the purpose of the Act without jeopardizing the ability of the military to ensure our national security. Indeed, it may well enhance it. The military routinely places people like petitioners in life threatening situations. While doing so, it deprives them of a benefit available to virtually every other United States citizen: the right to sue civilians for negligent acts. Denying people like petitioners access to the Courts solely because they wear the uniform of the United States is an aberration long overdue for abrogation.

CONCLUSION

The issues presented in this case merit consideration by this Court. There are no collateral issues which will complicate the Court's treatment of the case and lengthen the proceedings. For the reasons stated above, and consistent with the opinion of the four dissenting justices in *United States v. Johnson, supra,* petitioners respectfully request a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

Respectfully submitted, this the 15th day of January, 1999.

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1069

BRADLEY BERRY; DONNA DAVID ELLIOTT, as Administratrix of the estate of Charles Elliott; LOUIS FETHERMAN; HOPE RAMIREZ, personal representative of the estate of Martin Lumbert and sole surviving heir; MUSTAFAH MANNSUR; KEVIN MILLER; JOHN RODRIGUEZ; JIM ROOS; RANDALL SCHARMEN; ROBERT SETTLE; LETICIA FETHERMAN; MARGARET ANN MANNSUR; SONDRA SETTLE SORRENDINO,

Plaintiffs – Appellants,

versus

UNITED STATES OF AMERICA,

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-96-1057-5-3-BO)

Submitted: September 29, 1998
Decided: October 20, 1998

Before WILKINS, HAMILTON, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Haral E. Carlin, Richard B. Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellants. Janice McKenzie Cole, United States Attorney, R. A. Renfer, Jr., Assistant United States Attorney, Anne M.. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellants appeal the district court's order granting the Appellee's motion to dismiss. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly we affirm on the reasoning of the district court. *Berry v. United States*, CA-96-1057-5-3-BO (E.D.N.C. Dec. 16, 1997). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. Thus, Appellee's motion to submit the case on briefs without oral argument is denied as moot.

AFFIRMED

United States District Court

Eastern District of North Carolina

BRADLEY BERRY, DONNA DAVID ELLIOTT, Administratrix of the Estate of Charles Elliott, LOUIS FETHERMAN, HOPE RAMIREZ, Personal Representative of the Estate of Martin Lumbert and Sole Surviving Heir, MUSTAFAH MANNSUR, KEVIN MILLER, JOHN RODRIGUEZ, JIM ROOS, RANDALL SCHARMEN, ROBERT SETTLE, LETICIA FETHERMAN, MARGARET ANN MANSURR, SONDRA SETTLE SORRENDINO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Judgment in a Civil Case

Case Number: 5:96-CV-1057-BO(3)

(Filed Dec. 16, 1997)

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the *Feres* doctrine precludes plaintiffs' action and that this Court is without authority to overrule existing Supreme Court

law, the government's Motion to Dismiss is GRANTED and this action is hereby DISMISSED.

JUDGMENT FILED AND ENTERED THIS 16TH DAY OF DECEMBER, 1997, AND COPIES MAILED TO:

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December 16, 1997

DAVID W. DANIEL, CLERK

/s/ Rebecca Bowe
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-1057-BO(3)

BRADLEY BERRY, et al., Plaintiffs,	)	
v.	)	ORDER
UNITED STATES OF AMERICA, Defendant.	)	(Filed Dec. 16, 1997)

This matter is before the Court on the government's Motion to Dismiss pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed below, the government's Motion is GRANTED.

BACKGROUND

The facts of this case are undisputed. On March 23, 1994, the United States Air Force was conducting routine F-16 fighter training exercises out of Pope Air Force Base. At the same time, C-130 Hercules aircraft training missions were also being conducted out of Pope AFB. Specifically, paratroopers from the Fort Bragg Army Base 82nd Airborne Division were on a ramp in the airfield of Pope AFB awaiting pick-up by the C-130s for routine jump training exercises. These training exercises were conducted pursuant to Air Combat Command Regulations, ACCR 51-50. After a ramp door aboard a C-130 malfunctioned, the C-130 obtained permission from Air Force Traffic Control military personnel at Pope AFB control tower and Federal Aviation Administration Air Traffic

Control civilian personnel at Fayetteville Approach Control and Washington Center to abort its training mission and return to base. However, the control towers had already cleared for landing an F-16 aircraft. The C-130 collided in mid-air above the airfield with the descending F-16. The F-16 crashed into the ramp on which the paratroopers were awaiting the C-130, causing a massive fire and barrage of wreckage from the plane being torn apart from the impact. As a result, 24 paratroopers died and another 100 sustained injuries.

After their administrative tort claims were denied, eight injured paratroopers and representatives of two deceased paratroopers brought this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, alleging negligence by both military and civilian air traffic control personnel.

DISCUSSION

Military personnel may not sue the federal government under the FTCA for injuries which are sustained "in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). Because a tortfeasor's military status is irrelevant, *see United States v. Johnson*, 481 U.S. 681, 686 (1987), the *Feres* doctrine applies with equal preclusive force to negligence suits brought against military and civilian personnel alike. Therefore, the only issue here is whether the injuries arose out of or were sustained during activity incident to plaintiffs' military service. *See Feres*, 340 U.S. at 146.

Plaintiffs do not dispute that the injuries alleged were sustained in the course of their military service and

they concede that *Feres* and *Johnson* mandate dismissal of this action. *See* Pl. Mem. at 4. However, plaintiffs argue *Feres* was wrongly decided and should be overruled. Because it is clear that the *Feres* doctrine precludes plaintiffs action and that this Court is without authority to overrule existing Supreme Court law, the government's Motion to Dismiss is hereby GRANTED.

SO ORDERED.

This 15th day of December, 1997.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

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* * *

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the Eastern District of North Carolina possessed subject matter jurisdiction in this Federal Tort Claims Act (hereinafter "FTCA") civil case pursuant to 28 U.S.C. §§1346(b) and 2671-80. This Appeal properly lies before the United States Court of Appeals for the Fourth Circuit, following final judgment and dismissal of this action, pursuant to F.R.App.P.3 and 4. Judgment was entered in this civil case on December 16, 1997. A timely Notice of Appeal as [sic] filed on January 12, 1998. This Appeal is from a Final Judgment of the United States District Court for the Eastern District of North Carolina.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the *Feres* Doctrine should be overruled?

II. Whether, even if the *Feres* Doctrine is not overruled, the extension of *Feres* in *United States v. Johnson* must be overruled?

STATEMENT OF THE CASE

Statement of the Proceedings

Plaintiffs initiated this action by Complaint filed December 20, 1996, alleging claims under the FTCA, 28

U.S.C. §§1346(b) and 2671-80, predicated on the negligence of numerous government

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:96-CV-1057-BO-(3)

BRADLEY BERRY, CHARLES ELLIOTT by DONNA DAVID ELLIOTT, as Administratrix of the Estate of Charles Elliott, LOUIS FETHERMAN, MARTIN LUMBERT by HOPE RAMIREZ. Personal Representative of the Estate of Martin Lumbert and Sole Surviving Heir, MUSTAFAN MANNSUR, KEVIN MILLER, JOHN RODRIGUEZ, JIM ROOS, RANDALL SCHARMEN, ROBERT SETTLE, LETICIA FETHERMAN, MARGARET ANN MANNSUR and SANDRA SETTLE SORRENDINO,	**AMENDED COMPLAINT** (Filed Feb. 12, 1997)
Plaintiffs,	
v.	
UNITED STATES OF AMERICA,	
Defendant	

I. PRELIMINARY STATEMENT

1. This action arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, based on the negligence of numerous government officials, but most specifically air traffic controllers at Fayetteville Approach Control and Washington Center (civilian) and Pope Air

Force Base Tower (military) which proximately resulted in a mid-air collision between two aircraft and serious injuries to plaintiffs with the death of two plaintiffs, Charles Elliott and Martin Lumbert on March 23, 1994, at Pope Air Force Base, North Carolina. As a result, this Complaint contains damage claims for personal injuries sustained by nine plaintiffs, wrongful death claims for two plaintiffs and loss of consortium claims for spouses of three plaintiffs.

II. JURISDICTION

2. This action arises under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671.80 as hereinafter more fully appears.

III. THE PARTIES

3. The Plaintiff, Bradley Berry, is a resident of Pierce County Washington, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

4. At all times relevant to the allegations of this Complaint Charles Elliott was a resident of Cumberland County, North Carolina and a citizen of the United States. Mr. Elliott died within ten hours of the incident complained of in this Complaint due to massive burns to ninety-five percent of his body. His Estate is represented in this action by his wife and the Administratrix of his Estate, Donna Elliott, who was a resident of Cumberland County, North Carolina and a citizen of the United States

and is now a resident of the Cabarrus County, North Carolina.

5. The Plaintiff, Louis Fetherman, is a resident of Moore County, North Carolina, and at all times relevant to the allegations of this Complaint was a resident of Moore County, North Carolina, and a citizen of the United States.

6. At all times relevant to the allegations of this Complaint Martin Lumbert was a resident of Cumberland County, North Carolina and a citizen of the United States. Mr. Lumbert died approximately nine months following injuries sustained over eighty-seven percent of his body as a result of the incident alleged in this Complaint. Mr. Lumbert's Estate is represented by his mother, sole surviving heir and attorney-in-fact, pursuant to a Power of Attorney signed by Mr. Lumbert prior to his death. At the time of Mr. Lumbert's death, he was a resident of the State of Texas.

7. Plaintiff, Mustafan Mannsur, is a resident of Cumberland County, North Carolina and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

8. Plaintiff, Kevin Miller, is a resident of Cobb County, Georgia, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

9. Plaintiff, John Rodriguez, is a resident of Cumberland County, North Carolina, and at all times relevant

to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

10. Plaintiff Jim Roos, is a resident of Bexar County, Texas, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

11. Plaintiff Randall Scharmen, is a resident of Cumberland County, North Carolina, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina and a citizen of the United States.

12. Plaintiff Robert Settle, is a resident of Cumberland County, North Carolina, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and a citizen of the United States.

13. Plaintiff Leticia Fetherman, is a resident of Moore County North Carolina, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina, and citizen of the United States.

14. Plaintiff Margaret Ann Mannsur is a resident of Cumberland County, North Carolina, and at all times relevant to the allegations of this Complaint was a resident of Cumberland County, North Carolina and a citizen of the United States.

15. Plaintiff Sondar Settle Sorrendino is a resident of Cumberland County, North Carolina, and at all times

relevant to the allegations of this Complaint was a resident of Cumberland County North Carolina, and a citizen of the United States.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

16. Pursuant to 28 U.S.C. § 2675(a), the claims set forth herein were presented to the Federal Aviation Administration and the United States Department of Defense, Department of the Air Force. All administrative claims were timely submitted and were denied by the agencies on July 1, 1996, in writing via certified mail.

17. At all times relevant hereto, the air traffic controllers a Fayetteville Approach Control and at Pope Air Force Base Tower and Washington Center were lawful employees of the Defendant, the United States of America. During all times mentioned in this Complaint, the air traffic controllers at Fayetteville Approach Control and Pope Air Force Base Tower and Washington Center were acting within the lawful scope and course of their employment with the Defendant, the United States of America.

V. STATEMENT OF THE FACTS

18. On March 23, 1994, at 13:09 Eastern Standard Time, a United States Air Force F-16D Model Jet, call sign "Weebad-3", piloted by CPT Joseph R. Jacyno, took off from Pope Air Force Base (PAFB), Fayetteville, North Carolina, on a training mission to the Dare County, North Carolina range, along with two other F-16's.

19. After the training mission was completed, the F-16D, "Weebad-3", returned to PAFB alone due to the lower fuel capacity of the F-16D Model.

20. At 14:07:11 (EST), "Weebad-3" contacted Fayetteville Approach Control and requested a straight-in simulated flame-out, (hereafter referred to as "SFO"), from 8,500 feet. The SFO approach was to be made at PAFB.

21. At 14:07:38 (EST), Fayetteville Approach Control instructed "Weebad-3" to do two things:

1) Enter holding Visible Flight Rules (VFR) until traffic was cleared out of the way.

2) Contact Pope Tower on Channel 3.

22. Fayetteville Approach Control then transmitted the following message, using an incorrect call sign: "Weebad-1" contact Pope Tower."

23. At 14:08:41 (EST), "Weebad-3" contacted Pope Tower for the straight-in SFO low approach.

24. At 14:09:58 (EST), "Weebad-3" called Pope Tower and advised he was at "5 DME" (Distance Measuring Equipment).

25. At 14:10:00 (EST), "Weebad-3" was advised by Pope Tower there was a large, slow C-130 aircraft on "short final on the go".

26. At 14:10:04 (EST), "Weebad-3" was cleared "to land" by Pope Tower.

27. "Weebad-3" acknowledged that his gear was checked for "low approach". Shortly thereafter, a mid-air

collision occurred involving the F-16D, call sign, "Weebad-3" and the C-130, call sign, "Hitman-31".

28. During CPT Jaynco's descent, the nose of his F-16D hit the right horizontal stabilizers of the C-130 call sign, "Hitman-31". After the mid-air collision, "Weebad-3" appeared to pitch approximately 30 degrees nose up and bank slightly to the right. The two pilots ejected safely to the ground.

29. After the mid-air collision, "Weebad-3" initially impacted the Green Ramp, located at PAFB, approximately 918 feet from a parked C-141 Air Force aircraft.

30. The F-16D bounced on the ramp, slid across the Green Ramp igniting the parked C-141, strewing wreckage along its path. The F-16D continued straight ahead, leaving the Green Ramp, sliding up the dirt rise, through a chain link fence, between two buildings in the 900 area of the base. Numerous casualties and deaths occurred in this area due to the presence of a large congregation of paratroopers preparing for a training jump.

31. "Hitman-31" circled PAFB and landed safely.

32. Pope Tower activated crash activities at 14:10:37 EST. The base Fire Department responded with two control vehicles, five primary fighting vehicles, one rescue vehicle, two fire engines and two tankers. The 23rd Medical Squadron responded with five ambulances and seventeen personnel.

33. The crash vehicles reached the scene at Green Ramp at 14:12 EST. The wounded paratroopers were taken to Womack Army Hospital for triage. Some were

evacated immediately to UNC Memorial Hospital in Chapel Hill, North Carolina. Others were airlifted immediately to Brooke Army Medical Center, Ft. Sam Houston, Texas.

VI. FIRST CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE RESULTING IN PERSONAL INJURIES TO BRADLEY BERRY

34. The allegations contained in paragraphs 1 through 33 are incorporated herein by reference.

35. On March 23, 1994, Plaintiff Bradley Berry was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

36. The negligence which caused the mid-air collision and proximately caused Plaintiffs' injuries occurred as a result of numerous failures of civilian and military air traffic controllers. Indeed, an investigative report of the crash issued by Defendant's Department of the Air Force entitled "AFR 110-14 USAF Air Craft Accident Investigation Report", conducted by Colonel Vincent J. Santillo, Jr., states as follows:

> Based on the evidence which I found to be clear and convincing, it is my opinion as investigating officer that there were multiple causes for the mid air collision. The majority of errors which caused the mid air collision occurred in Air Traffic Control. This includes the use by the Fayetteville Approach Controller of improper SFO hand-off procedures for the F16, and a chain of errors by ATC personnel in the Tower. The local controller trainee tried on several

occasions to provide separation for the two mishap air craft, but did not do so. The local controller monitor supervising the trainee also did not conflict the two air craft. He did not issue a traffic advisory on the C-130 to the F-16 until just prior to the mid air collision. Overseeing the entire local control sequence, the Tower watch supervisor did not correct errors by his personnel and ensure traffic separation. The confusion caused by the incorrect call sign, the uncorrected tower radar display, the coordinator's erroneous placement of flight data strips, and the unfamiliarity with F-16 straight-in SFO patterns by four of the five ATC personnel involved were all significant. The F-16 pilot did not "see and avoid" and stay "well clear" of the mishap C-130, as required by a AFR 60-16. However, pilot testimony suggests the C-130 was not in the F-16 pilot's field of view. The pilot became concerned about a potential conflict with the mishap C-130 after being advised of its presence, and was in the process of executing a low approach when the mid air occurred. Another cause for the mid air collision was insufficient training of ATC personnel, since four of the five ATC personnel involved had never seen an F-16 straight-in SFO, and were untrained in handling it. A final consideration is that while there were two letters of agreement which included F-16 SFO procedures, there was no evidence of a comprehensive air space plan which addressed flying operations for the various types of aircraft based at Pope AFB. A single source reference document for local operating procedures on all Pope air craft (A-10, C-130 and F-16) was not yet published on the date of the mishap.

37. The negligent and improper handling of the SFO procedures by Fayetteville Approach Control stems from a Letter of Agreement dated January 24, 1994, between Fayetteville Approach Control and PAFB. This Letter of Agreement was signed by Randall L. Breedlove, Air Traffic Manager, Fayetteville Air Traffic Control Tower; Michael J. Snedeker, LTC, U.S. Air Force, Commander, 23rd Operations Support Squadron and O. R. Smith, Military Liaison Officer with PAFB and Ft. Bragg, North Carolina.

38. This Letter of Agreement requires the following actions to be taken during the normal and reasonable handling of inbound aircraft which will be conducting a straight-in simulated flame-out (SFO) approach to PAFB:

1. Fayetteville Approach Control updates the radar data block associated with the aircraft to include the following: Aircraft identification number, type, type of approach, how it will terminate if other than a full stop [low approach, etc.] and climb-out procedures.

2. Fayetteville Approach Control then clears the aircraft to the 11 DME fix for PAFB Runway 23 at 9,000 Ft. Prior to commencing this particular procedure, Fayetteville Approach Control *must* accomplish *manual* coordination with Pope Tower, prior to the aircraft reaching 15 flying miles from the runway. This manual coordination would be a direct *verbal* passing of the aircraft's planned activity from Fayetteville Approach Control to Pope Tower by land line.

3. The aircraft should then be cleared to commence the approach and is instructed to contact Pope Tower no latter than 7 miles from the runway. The aircraft should then contact Pope Tower and be informed of traffic information, as required, and issued clearance for a low approach.

39. On March 23, 1994, Fayetteville Approach Control [North Sector] was being operated by Joyce Caughorn (hereafter "Caughorn"). Fayetteville Approach Control [North Sector] accepted an automated handoff from Washington Air Traffic Control Center on the F-16D, Call sign "Weebad-3".

40. Critically, the computer data block associated with this aircraft, as well as the flight progress strip [flight plan], incorrectly displayed the call sign, "Weebad-1" instead of "Weebad-3". This error was never corrected throughout the incident. The data block associated with the aircraft identification was not updated by Fayetteville Approach Control [North Sector] in accordance with the above mentioned Letter of Agreement.

41. "Weebad-3" contacted Fayetteville Approach Control and requested a 10-mile straight-in SFO to Runway 23 at PAFB.

42. Fayetteville Approach Control instructed "Weebad-3" to proceed toward Initial Approach Fix (IAF) at 8,500 and hold VFR.

43. Without issuing a specific clearance to commence an approach, Fayetteville Approach Control [North Sector] transmitted the following to "Weebad-3": "'Weebad-3" contact Pope Tower channel 3".

44. Fayetteville Approach Control then tried to correct what was thought to be an error due to the mislabeled data block by transmitting the following: "Correction, "Weebad-1" contact Pope Tower Channel 3". However, there was a 10 second delay before the Fayetteville Approach Control [North Sector] attempted the correction and CPT Jaynco, the pilot of the F-16D, call sign, "Weebad-3", had already switched to Pope Tower frequency. Jacyno never received the delayed message.

45. Fayetteville Approach Control [North Sector] also negligently failed to comply with the January, 1994, Letter of Agreement, Paragraph 9B(3), by failing to manually coordinate the straight-in SFO with Pope Tower.

46. Fayetteville Approach Control [North Sector] then negligently failed to update the aircraft identification data block that is associated with the aircraft in accordance with the same Letter of Agreement.

47. Caughorn, the Air Traffic Controller who was on duty in the [North Sector] at Fayetteville Approach Control, later stated this was the first time she had ever seen a straight-in SFO. She was contacted by Jacyno who requested a straight-in SFO. She printed his VFR descent and he went out to hold at "high key". She then turned the traffic away, let him go, and switched him to Pope Tower.

48. After Caughorn switched Jacyno over to Pope Tower, she did not have a flight progress strip for "Weebad-3", but now saw a progress strip for an erroneously labeled "Weebad-1". Caughorn assumed she had used the wrong call sign, so she contacted "Weebad-3", as

set forth above in paragraphs 43 and 44, with the following transmission: " "Weebad-3" contact Pope Tower, Channel 3." Caughorn then transmitted the following: " "Weebad-1" contact Pope Tower, Channel 3." Caughorn subsequently called Pope Tower on the radio, with the following inquiry: "Pope, did "Weebad" come over to you?" Pope Tower replied in the affirmative.

49. However, as set forth above, in Caughorn's contact with PAFB, Caughorn never used the number associated with the call sign. She only referred to the aircraft as "Weebad".

50. The Letters of Agreement between PAFB and Fayetteville Approach Control were not followed by Fayetteville Approach Control, North Controller and Pope Tower Controllers and supervisors. This failure likewise constitutes negligence.

51. The Letter of Agreement dated 24, January, 1994, requires controllers to telephonically coordinate straight-in SFO's with Pope Tower and this was not done.

52. William Robert Ellis, Supervisor, Air Traffic Control, Fayetteville, was on duty on March 23, 1994, and saw the "tag", which would indicate the call sign for the F-16D aircraft, only once and that occurred right before the aircraft came over Fayetteville Approach Control on the hand-off from Washington Center.

53. Ellis glanced up and saw the "tag" on Fayetteville Approach Control's radar scopes. Ellis became confused as to what Washington Center had given Fayetteville Approach Control on this call sign. Ellis understood that the flight data strip was sent from Washington

Center with "Weebad-1" in the identification data block. In fact the actual call sign was "Weebad-3".

54. Accordingly, Ellis saw the data strip as it came from Washington Center and had knowledge it was not updated by Fayetteville Approach [North Sector] in the data blocks before it was passed on to PAFB.

55. Following the mislabeled and inadequate hand-off by Fayetteville Approach Tower, on several occasions, Pope Tower referred to the F-16D, who at that point had already started his descent to Runway 23 at PAFB, by the incorrect call sign "Weebad-1".

56. Jacyno, the pilot, of the F-16D, "Weebad-3", started to talk with Fayetteville Tower (Caughorn) about trying to coordinate for his straight-in SFO and Fayetteville Tower advised him to set up a VFR holding pattern at about 10 miles and they would coordinate.

57. Jacyno responded by starting a right-hand turn at which time Fayetteville Tower informed him he was clear to switch to Pope Tower. Jacyno then stated he was "good to go, I've got this SFO, switched over to tower, tell tower I'm 10 miles straight-in SFO".

58. Pope Tower, then incorrectly identified the F-16D as a slower C-130, and responded: "Roger; traffic is a C-130 doing a right 360 on down wind, report 5 miles".

59. Jacyno, believing he was clear, started on his downward decent, lowered the gear and received his SFO.

60. Jacyno actually never went into a holding pattern. He was transferred to Pope Tower, contacted the Tower and started his way down.

61. Jacyno later admitted that in his dealings with the Tower at PAFB "they messed up my call sign once or twice on my way down".

62. When "Weebad-3" reported to Pope Tower that he was at 10 DME for a straight-in SFO or low approach, the call was originally not acknowledged by the local controller at Pope Tower.

63. Since no manual inbound coordination had been accomplished that required Fayetteville Approach Control to contact Pope and manually coordinate the straight-in SFO, the coordinator at Pope Tower should have contacted Fayetteville Approach Control by telephone to ascertain the intentions of "Weebad-3". This was not accomplished and this failure likewise constituted an act of negligence.

64. Had Fayetteville Approach Control complied with the Letter of Agreement, it would have given the coordinator at Pope Tower the option to cancel the SFO completely, if it was not compatible with the current traffic flow, which it was not.

65. After receiving clearance to land from Pope Tower, "Weebad-3" started his descent.

66. On several occasions, Pope Tower attempted to contact the F-16D, believing it to be the slower C-130 by again using the incorrect call sign of "Weebad-1", instead of "Weebad-3". Jacyno never responded due to the incorrect call sign. This failure occurred because Fayetteville Approach Control negligently failed to update the data

block, identifying the aircraft. As a result of this negligence, the next four transmissions by Pope Tower to the F-16D pilot all began with the wrong call sign.

67. SGT Barnes, the local controller at Pope Tower, did not get any calls from Fayetteville Approach Control prior to his first communication with the F-16D pilot, "Weebad-3". He kept calling the pilot, "Weebad-1" because he was tagged as such with the data block that had the wrong call sign coming in from Fayetteville Approach Control to Barnes.

68. The first time Pope Tower realized there was an F-16 in their area was when they heard the pilot call in and say he was at 10 DME. Pope Tower officials were extraordinarily surprised by this type of approach. If reasonable care had been exercised, Pope Tower would have been informed of this particular approach by Fayetteville Tower, but Pope Tower was never notified by Fayetteville Tower.

69. As previously alleged Barnes, the local controller at Pope Tower, first realized that "Weebad-3" was on final dissent when the pilot reported that he was at 8-10 DME. Barnes replied to the F-16D, using the wrong call sign, "Weebad-1". Barnes instructed the pilot to report at a 5 DME and again used the incorrect call sign of "Weebad-1". He then issued traffic orders, erroneously notifying the F-16 that a C-130 was orbiting the field at 4,500 Ft.

70. Barnes then furiously attempted twice to have another aircraft, the C-130, "Hitman-31", which was the aircraft actually impacted by the jet, go on a right downwind maneuver and execute a left 360 degree turn, so as

to sequence it behind the incoming F-16D, "Weebad-3". Barnes' efforts failed due to the fact that Barnes twice used the wrong call-sign for the C-130. Instead of using the call sign "Hitman-31" to move the impact airplane out of the way, he used a call sign, "Felex-03". However, "Felex-03" had already landed, completed a full stop and had taxied back to Taxi-Way Delta. It was awaiting another takeoff.

71. By the time the above mentioned call sign mistakes were cleared up, "Hitman-31" had already begun its fatal right base turn.

72. "Hitman-31" was then instructed to fly straight through final and make a left 270 degree turn and report back when he was actually on final dissent. This instruction was over-ridden by Senior Airman Combs, the local Control Monitor, who instructed "Hitman-31" to continue straight-in for a low approach and issued a traffic order to the F-16D, now on its fast five mile final run.

73. "Weebad-3" then reported as instructed at 5 DME, at which time the local controller stated "Roger, you have C-130 traffic, short final, on-the-go", and cleared "Weebad-3" to land. Jacyno then indicated his gear was down and stated he was in low approach.

74. At that same time, "Hitman-31" piloted by LT Adam Zaret, was in the process of completing a low approach to Runway 23 at PAFB. Shortly after being cleared by Pope Tower for a right closed pattern, "Hitman-31" was struck from behind by "Weebad-3".

75. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a

duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

76. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused Sgt. Bradley Berry's injuries on March 23, 1994.

77. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

78. Air Traffic controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

79. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

80. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff suffered multiple burns, second to third degree, over his hands, entire back to proximal thighs and scattered burns to his bilateral lower legs. Plaintiff suffered 40% body surface burns as well as injuries to his right hand. Plaintiff has been treated at Womack Army Hospital and Brooke Army Medical Center for his injuries.

81. The aforesaid injuries were caused solely by Defendant, its agents, servants or employees and without any negligence on the part of Plaintiff contributing thereto.

82. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and continues to suffer great pain in body and mind. Plaintiff

also suffered from disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

83. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

84. In sum, Plaintiff's claim is for personal injury as a result of the negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

85. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

VII. SECOND CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING PLAINTIFF LOUIS FETHERMAN'S PERSONAL INJURIES

86. The allegations of paragraphs 1 through 85 are incorporated herein by reference.

87. On March 23, 1994, Plaintiff Louis Fetherman was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

88. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

89. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SGT Louis Fetherman's injuries on March 23, 1994.

90. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

91. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

92. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

93. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Fetherman suffered burns over 17.5 percent of his total body surface area including third degree burns to his trunk, right and left hands, second degree burns to his head, trunk, right and left arms, right and left hands, right and left thighs and left leg. Significant skin grafting of several portions of Plaintiff Fetherman's body and hands were required and he has been under medical care at Brooke Army Medical Center, Womack Army Medical Center and the University of North Carolina Physician's and Associates at Chapel Hill, North Carolina.

94. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and

continues to suffer great pain in body and mind. Plaintiff also suffered from disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

95. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

96. In sum, Plaintiff's claim is for personal injury as a result of the negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

97. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

VIII. THIRD CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING PLAINTIFF MUSTAFAN MANNSUR'S PERSONAL INJURIES

98. The allegations contained in paragraphs 1 through 96 are incorporated herein by reference.

99. On March 23, 1994, Plaintiff Mustafan Mannsur was a Sergeant in the United States Army and was one of

the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

100. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

101. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SFC Mustafan Mannsur's injuries on March 23, 1994.

102. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

103. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

104. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

105. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Mannsur suffered burns to his face, left forearm and throat. In addition, Plaintiff suffered burns and injuries to his left leg which required surgery due to several fractures. Plaintiff also suffered multiple tendon lacerations in his left hand. Plaintiff was treated at Cape Fear Valley Hospital in Fayetteville, North Carolina, Womack Army Medical Center and Walter Reed Hospital.

106. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and continues to suffer great pain in body and mind. Plaintiff also suffered from disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

107. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

108. In sum, Plaintiff's claim is for personal injury as a result of the negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

109. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

IX. FOURTH CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING PLAINTIFF KEVIN MILLER'S PERSONAL INJURIES

110. The allegations contained in paragraphs 1 through 107 are incorporated herein by reference.

111. On March 23, 1994, Plaintiff Kevin Miller was a Specialist in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

112. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

113. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SPC Kevin Miller's injuries on March 23, 1994.

114. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

115. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

116. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

117. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Miller suffered second and third degree burns over eighty percent of his hands, second degree burns to his head and an unspecified percentage of burns to his total body surface area. Plaintiff was treated at Womack Army Medical Center and at Brooke Army Medical Center for his injuries.

118. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and

continues to suffer great pain in body and mind. Plaintiff also suffered from disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

119. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

120. In sum, Plaintiff's claim is for personal injury as a result of the negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

121. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

X. FIFTH CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING PLAINTIFF JOHN RODRIGUEZ'S PERSONAL INJURIES

122. The allegations contained in paragraphs 1 through 118 are incorporated herein by reference.

123. On March 23, 1994, Plaintiff John Rodriguez was a Sergeant in the United States Army and was one of

the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

124. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

125. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SGT John Rodriguez's injuries on March 23, 1994.

126. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

127. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

128. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

129. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Rodriguez suffered fractures and dislocation of ligaments, lacerations to several portions of his body and was treated at Womack Army Medical Center for his injuries, including surgery for injuries to his right shoulder which required the placement of two pins.

130. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and

continues to suffer great pain in body and mind. Plaintiff also suffered mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

131. If the Defendant were a private person, it would liable [sic] to the Plaintiffs in accordance with the law of North Carolina.

132. In sum, Plaintiff's claim is for personal injury as a result of the negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

133. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

XI. SIXTH CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING JIM ROOS' PERSONAL INJURIES

134. The allegations contained in paragraphs 1 through 129 are incorporated herein by reference.

135. On March 23, 1994, Plaintiff Jim Roos was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

136. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

137. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused Jim Roos' injuries on March 23, 1994.

138. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

139. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

140. The negligent acts of Air Traffic controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

141. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Roos suffered burns over 43.25 percent of his total body surface including third degree burns of his neck, trunk, arms hands as well as his legs; second degree burns to his head, buttocks, genitalia, arms, legs, hands and thighs. In addition, Plaintiff suffered from a severe staff infection of the face and back. Plaintiff was treated at both Womack Army Medical Center and Brooke Army Medical Center for his injuries.

142. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and continues to suffer great pain in body and mind. Plaintiff also suffered disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered

serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

143. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

144. In sum, Plaintiff's claim is for personal injury as a result of negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

145. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

XII. SEVENTH CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING RANDALL SCHARMEN'S PERSONAL INJURIES

146. The allegations contained in paragraph 1 through 140 are incorporated herein by reference.

147. On March 23, 1994, Plaintiff Randall Scharmen was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

148. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a

duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

149. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SGT Randall Scharmen's injuries on March 23, 1994.

150. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

151. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

152. The negligent acts of Air Traffic controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

153. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Scharmen suffered second degree facial burns, second degree burns to his hands and burns over thirty four percent of his total body surface, including his back, buttocks and lower extremities. In addition, one piece of Plaintiff's ear was burned off. Plaintiff was treated at Womack Army Medical Center and Brooke Army Medical Center for his injuries.

154. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and continues to suffer great pain in body and mind. Plaintiff also suffered disfigurement and scarring on the areas burned and injured in the crash. Plaintiff also suffered serious mental and emotional anguish over his injuries as well as the death and injuries to dozens of his friends and soldiers in his unit.

155. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

156. In sum, Plaintiff's claim is for personal injury as a result of negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

157. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

XII. [sic] EIGHTH CLAIM FOR RELIEF: DEFENDANT'S NEGLIGENCE CAUSING ROBERT SETTLE'S PERSONAL INJURIES

158. The allegations contained in paragraphs 1 through 151 are incorporated herein by reference.

159. On March 23, 1994, Plaintiff Randall Scharmen [sic] was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

160. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others

against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform to their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

161. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SGT Robert Settle's injuries on March 23, 1994.

162. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to professional standards of care for the protection of others against unreasonable risks.

163. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

164. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

165. As a result of the crash at Pope Air Force Base on March 23, 1994, Plaintiff Settle suffered 6.5 percent total body surface area burns, including third degree burns of his right and left hand as well as second degree burns of his head, right hand and left hand. Plaintiff also suffered a left clavicular fracture and serious mental and emotional anguish over his injuries, death and injuries of dozens of his friends and soldiers under his command. Plaintiff was treated at Womack Army Medical Center and Brooke Army Medical Center for his injuries.

166. As a direct and proximate result of the negligence of Defendant's agents, servants and employees, Plaintiff was injured as described above and suffered and continues to suffer great pain in body and mind. Plaintiff also suffered disfigurement and scarring on the areas burned and injured in the crash.

167. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

168. In sum, Plaintiff's claim is for personal injury as a result of negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

169. Wherefore, Plaintiff demands judgment against Defendant for a sum in excess of ten thousand dollars ($10,000.00) for compensatory damages.

XIII. NINTH CLAIM FOR RELIEF: WRONGFUL DEATH OF CHARLES ELLIOTT

170. The allegations of paragraphs 1 through 163 are incorporated herein by reference.

171. On March 23, 1994, Plaintiff Charles Elliott was a Sergeant in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

172. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and, in fact, breached those standards of care as required by law.

173. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SSG Charles Elliott's injuries and death on March 23, 1994.

174. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to the professional standards of care for the protection of others against unreasonable risks.

175. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

176. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control, Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

177. The negligence of all the agents, employees and officials of the Defendant, as set forth above, proximately caused the death of SSG Charles Elliott. SSG Elliott's death was the result of thermal burns over ninety five percent of his body and other injuries received in the aircraft crash on March 23, 1994. SSG Elliott lived for approximately ten to eleven hours following the accident, was conscious on the air field and at Womack Army Medical Center, which initially treated SSG Elliott until he could be airlifted to the University of North Carolina at Chapel Hill Burn Center, where SSG Elliott died.

178. Prior to his death, Sgt. Charles Elliott was a twenty seven year old husband of Plaintiff Donna Elliott and the father of two minor children, and provided society, companionship, comfort, guidance and advice to his family. At all times, Sgt. Elliott was employed and provided support for himself, his wife and family. As a result of the death of Sgt. Elliott, Plaintiff, as the Administratrix of his Estate, has been damaged and makes claims for the following.

A. Compensation for Sgt. Charles Elliott's physical, mental and emotional pain and suffering prior to his death;

B. Reasonable funeral expenses of Sgt. Charles Elliott; and

C. The present monetary value of Sgt. Charles Eliott to his wife and children, including net income, services, protection, care and assistance, society, companionship, comfort, guidance and kindly offices and advice.

179. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

180. In sum, Plaintiff's claim is for the wrongful death of SGT Charles Elliott as a result of negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

181. Wherefore, Plaintiff, as Administratrix of the Estate of Charles Elliott, have and recover an amount in excess of ten thousand dollars ($10,000.00) for Defendant.

XIV. TENTH CLAIM FOR RELIEF: WRONGFUL DEATH OF MARTIN LUMBERT

182. The allegations contained in paragraphs 1 through 173 are incorporated herein by reference.

183. On March 23, 1994, Plaintiff Martin Lumbert was a Specialist in the United States Army and was one of the paratroopers preparing for a training jump when the above-referenced crash at PAFB occurred.

184. Civilian Air Traffic Controllers at Fayetteville Approach Control, as well as Washington Center, owed a duty, recognized by law, to conform their conduct to the professional standard of care for the protection of others against unreasonable risks. The Civilian Air Traffic Control at Fayetteville Approach Control and at Washington Center failed to conform their conduct to the general standards of care and in fact breached those standards of care as required by law.

185. The breach of this duty of care by Civilian Air Traffic at Fayetteville Approach Control and Washington Center proximately caused SPC Martin Lumbert's injuries and death on March 23, 1994.

186. In addition, separate and apart from the duties owed to the Plaintiff by the Civilian Air Traffic Control at Fayetteville Approach Control and Washington Center, were the duties, recognized by law, for Air Traffic Control at Pope Tower to conform their conduct to the professional standards of care for the protection of others against unreasonable risks.

187. Air Traffic Controllers and other officials in Pope Tower breached this duty of care and that breach was another proximate cause, separate and distinct from the negligence of Fayetteville Approach Control and Washington Center civilian controllers, for Plaintiff's injuries.

188. The negligent acts of Air Traffic Controllers and personnel in Fayetteville Approach Control. Washington Tower and in Pope Tower included, but were not limited to, the following:

A. Use of improper hand-off procedures for the F-16D by Fayetteville to Pope Tower;

B. Use of incorrect call signs by all air traffic controllers;

C. Improper and inadequate supervision of air traffic controller trainees and personnel;

D. Uncorrected erroneous tower radar displays;

E. Erroneous placement of flight data strips;

F. Unfamiliarity with F-16D straight-in SFO landing patterns by air traffic controllers and personnel;

G. Insufficient and inadequate training of personnel; and

H. In adequate [sic] comprehensive air space plan.

189. The negligence of all the agents, employees and official of the Defendant, proximately caused the death of SPC Martin Lumbert. SPC Lumbert's death was the result of burns over eighty seven percent of his body with seventy five percent of those burns being third degree burns. Both of Lumbert's legs required amputation above the knees as well as amputation of all his fingers. Martin Lumbert was treated initially at Womach Army Medical Center and then at Brooke Army Medical Center for most of the remainder of his life following the March 23, 1994, aircraft crash. Martin Lumbert lived, despite his injuries, in excruciating pain for approximately nine months following the crash.

190. Prior to his death, Martin Lumbert was the twenty two year old son of the Plaintiff Hope Ramirez

and he provided society, companionship, comfort, guidance and advice to his mother. At all times, Martin Lumbert was employed and provided support for himself and, on occasion, his mother. As a result of the death of Martin Lumbert, Plaintiff, as his sole surviving heir and personal representative of Martin Lumbert as well as his attorney-in-fact pursuant to a Power of Attorney form signed by Martin Lumbert, prior to his death, on March 26, 1994, has been damaged and makes claims for the following:

A. Compensation for Martin Lumbert's physical, mental and emotional pain and suffering prior to his death;

B. Reasonable funeral expenses of Martin Lumbert; and

C. The present monetary value of Martin Lumbert to his mother, including net income, services, protection, care and assistance, society, companionship, comfort, guidance and kindly offices and advice.

191. If the Defendant were a private person, it would [sic] liable to the Plaintiffs in accordance with the law of North Carolina.

192. In sum, Plaintiff's claim is for personal injury as a result of negligence of federal employees, agents and officials serving as air traffic controllers at Fayetteville Approach Control, Washington Center and Pope Air Force Base Tower where those employees, agents and officials were acting within the course and scope of their employment and the circumstances are such if the Defendant were a private party, liability would be imposed under North Carolina law.

193. Wherefore, Plaintiff, as the personal representative, sole surviving heir and attorney-in-fact of Martin Lumbert have and recover an amount in excess of ten thousand dollars ($10,000.00) from the Defendant.

XV. ELEVENTH CLAIM FOR RELIEF: PLAINTIFF LETICIA FETHERMAN – LOSS OF CONSORTIUM

194. The allegations contained in paragraphs 1 through 184 are incorporated herein by reference.

195. Plaintiff Leticia Fetherman is the wife of Plaintiff Louis Fetherman and has been married to him since November 5, 1984.

196. Prior to the date of Plaintiff Louis Fetherman's injuries, Mr. and Mrs. Fetherman enjoyed a happy marriage and the love and affection of each other and reasonably anticipated many more years of conjugal happiness.

197. As a direct and proximate result of the aforesaid actions of Defendant, Plaintiff Leticia Fetherman, has been deprived of the society, companionship, sexual gratification and affection of Plaintiff Louis Fetherman and has been damaged in an amount in excess of ten thousand dollars ($10,000.00).

XVI. TWELFTH CLAIM FOR RELIEF: PLAINTIFF MARGARET ANN MANNSUR'S LOSS OF CONSORTIUM

198. The allegations contained in paragraphs 1 through 188 are incorporated herein by reference.

199. Plaintiff Margaret Ann Mannsur is the wife of Plaintiff Mustafan Mannsur and has been married to him since July 17, 1981.

200. Prior to the date of Plaintiff Mustafan Mannsur's injuries, Mr. and Mrs. Mannsur enjoyed a happy marriage and the love and affection of each other and reasonably anticipated many more years of conjugal happiness.

201. As a direct and proximate result of the aforesaid actions of Defendant, Plaintiff Margaret Ann Mannsur, has been deprived of the society, companionship, sexual gratification and affection of Plaintiff Mustafan Mannsur and has been damaged in an amount in excess of ten thousand dollars. ($10,000.00).

XVII. THIRTEENTH CLAIM FOR RELIEF: PLAINTIFF SANDRA SETTLE SORRENDINO'S LOSS OF CONSORTIUM

202. The allegations contained in paragraphs 1 through 192 are incorporated herein by reference.

203. Plaintiff Sandra Settle Sorrendino was the wife of Plaintiff Robert Settle and was married to him from February 14, 1988 until April 19, 1996.

204. Prior to the date of Plaintiff Robert Settle's injuries, Mr. and Mrs. Settle enjoyed a happy marriage and the love and affection of each other and reasonably anticipated many more years of conjugal happiness.

205. In addition, as a direct and proximate result of the aforesaid actions of Defendant and the resulting injuries of Plaintiff Robert Settle, Mr. and Mrs. Settle separated and were divorced.

206. As a direct and proximate result of the aforesaid actions of Defendant, Plaintiff Sandra Settle Sorrendino, was deprived of the society, companionship, sexual gratification and affection of Plaintiff Robert Settle and has been damages in an amount in excess of ten thousand dollars ($10,000.00).

207. All of the claims for relief set forth in this Complaint are filed pursuant to F.R. Civ. P. 11(b)(2) and Plaintiffs are seeking modification or reversal of existing law under *Feres v. United States*, 340 U.S. 135 (1950) and *United States v. Johnson*, 481 U.S. 681 (1987).

WHEREFORE, Plaintiffs pray:

1. For the First Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

2. For the Second Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

3. For the Third Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

4. For the Fourth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to

the amount demanded in the original administrative Federal Tort Claim;

5. For the Fifth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

6. For the Sixth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

7. For the Seventh Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

8. For the Eighth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

9. For the Ninth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

10. For the Tenth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

11. For the Eleventh Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

12. For the Twelfth Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

13. For the Thirteen Claim for Relief, a sum in excess of ten thousand dollars for compensatory damages up to the amount demanded in the original administrative Federal Tort Claim;

14. The costs of this action, including reasonable interest as provided by law, be taxed to Defendant; and

15. For such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, this 12 day of February, 1997.

BEAVER, HOLT, RICHARDSON,
STERNLICHT, BURGE &
GLAZIER, P.A.

BY: /s/ Richard B. Glazier by MAS
Richard B. Glazier
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STATE OF Washington

COUNTY Pierce **VERIFICATION**

BRADLEY D. BERRY being first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ Bradley D. Berry
BRADLEY D. BERRY

Sworn to and subscribed before me,
this 2d day of January, 1997.

/s/ Virginia M. Clausen
Notary Public
Virginia M. Clausen

My Commission Expires: 9 April 99

[SEAL]

STATE OF North Carolina

COUNTY Cabarrus **VERIFICATION**

DONNA ELLIOTT first duly sworn, deposes and says: That she is the Plaintiff in the foregoing action and she has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of her own knowledge, except as to those matters and things alleged

on information and belief, and as to those matters and things, she believes them to be true.

/s/ Donna Elliott
DONNA ELLIOTT

Sworn to and subscribed before me,
this 6th day of January, 1997.

/s/ Tonya Smith
Notary Public

My Commission Expires: Feb. 16, 2000

[SEAL]

STATE OF North Carolina

COUNTY Cumberland

VERIFICATION

LOUIS FETHERMAN first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ Louis Fetherman
LOUIS FETHERMAN

Sworn to and subscribed before me,
this 2nd day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF Texas

COUNTY Bexar **VERIFICATION**

HOPE RAMERIZ being first duly sworn, deposes and says: That she is the Plaintiff in the foregoing action and she has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of her own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, she believes them to be true.

/s/ Hope Rameriz
HOPE RAMERIZ

Sworn to and subscribed before me,
this 30th day of December, 1996.

/s/ Clara Rodriguez
Notary Public

My Commission Expires: 10-27-97

[SEAL]

STATE OF NORTH CAROLINA

COUNTY CUMBERLAND **VERIFICATION**

MUSTAFAH MANNSUR first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged

on information and belief, and as to those matters and things, he believes them to be true.

/s/ Mustafah Mannsur
MUSTAFAH MANNSUR

Sworn to and subscribed before me,
this 2nd day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF Georgia

COUNTY Cobb

VERIFICATION

KEVIN L. MILLER first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ Kevin L. Miller
KEVIN L. MILLER

Sworn to and subscribed before me,
this 6th day of January, 1997.

/s/ Andrea Perkins
Notary Public

My Commission Expires: Notary Public, Dekalb County, Georgia
My Commission Expires Jan. 17, 1998

STATE OF North Carolina

COUNTY Cumberland **VERIFICATION**

JOHN RODRIGUEZ first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ John Rodriguez
JOHN RODRIGUEZ

Sworn to and subscribed before me,
this 2nd day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/97

[SEAL]

STATE OF Texas

COUNTY Bexar **VERIFICATION**

JIM D. ROOS first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on

information and belief, and as to those matters and things, he believes them to be true.

/s/ Jim D. Roos
JIM D. ROOS

Sworn to and subscribed before me,
this 30 day of December, 1996.

/s/ Rita L. Farrell
Notary Public

My Commission Expires: 9-16-97

[SEAL]

STATE OF North Carolina

COUNTY Cumberland

VERIFICATION

RANDALL K. SCHARMEN first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ Randall K. Scharmen
RANDALL K. SCHARMEN

Sworn to and subscribed before me,
this 7th day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF North Carolina

COUNTY Cumberland **VERIFICATION**

ROBERT M. SETTLE being first duly sworn, deposes and says: That he is the Plaintiff in the foregoing action and he has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, he believes them to be true.

/s/ Robert M. Settle
ROBERT M. SETTLE

Sworn to and subscribed before me,
this 7th day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF North Carolina

COUNTY Cumberland **VERIFICATION**

LETICIA FETHERMAN first duly sworn, deposes and says: That she is the Plaintiff in the foregoing action and she has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of her own knowledge, except as to those matters and things alleged

on information and belief, and as to those matters and things, she believes them to be true.

/s/ Leticia Fetherman
LETICIA FETHERMAN

Sworn to and subscribed before me,
this 2nd day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF NORTH CAROLINA

COUNTY CUMBERLAND **VERIFICATION**

MARGARET MANNSUR first duly sworn, deposes and says: That she is the Plaintiff in the foregoing action and she has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of her own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, she believes them to be true.

/s/ Margaret Mannsur
MARGARET MANNSUR

Sworn to and subscribed before me,
this 2nd day of January, 1997.

/s/ Tonya L. Parrilla
Notary Public

My Commission Expires: 8/15/99

[SEAL]

STATE OF North Carolina

COUNTY Cumberland **VERIFICATION**

SANDRA SORRENDINO being first duly sworn, deposes and says: That she is the Plaintiff in the foregoing action and she has read the foregoing Complaint, knowing the contents thereof; and the same is true to the best of her own knowledge, except as to those matters and things alleged on information and belief, and as to those matters and things, she believes them to be true.

/s/ Sandra Sorrendino
SANDRA SORRENDINO

Sworn to and subscribed before me,
this 24th day of December, 1996.

/s/ Joyce H. Harris
Notary Public

My Commission Expires: 6-15-2000

[SEAL]

28 U.S.C. § 1346. United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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28 U.S.C. § 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons

acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

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28 U.S.C. § 2672. Administrative adjustment of claims.

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the

authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the united States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in any amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive

on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter.

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28 U.S.C. § 2673. Repealed.

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28 U.S.C. § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case where in death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as

well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

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28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence.

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of

Civil Procedure by third party complaint, cross-claim, or counter-claim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

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28 U.S.C. § 2676. Judgment as bar.

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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28 U.S.C. § 2677. Compromise.

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

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28 U.S.C. § 2678. Attorney fees; penalty.

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

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28 U.S.C. § 2679. Exclusiveness of remedy.

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by

reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceedings is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office, or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of

this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, inconsidering [sic] the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil actions.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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28 U.S.C. § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claims arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.